

5 Official Opinions of the Compliance Board 117

NOTICE REQUIREMENTS – METHOD – PROPER WRITTEN NOTICE COMPLIES WITH ACT DESPITE ALLEGEDLY INCORRECT INFORMATION GIVEN BY EMPLOYEE TO ONE MEMBER OF THE PUBLIC

February 21, 2007

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The Open Meetings Compliance Board has considered the complaint filed on behalf of Mr. Robert G. Scrimgeour, alleging that the Talbot County Planning Commission violated the notice and openness provisions of the Open Meetings Act in connection with a meeting on September 6, 2006. For the reasons explained below, we conclude that no violation occurred.

I

Complaint and Response

The dispute underlying this matter involves construction of a large equestrian structure on Ferry Farm Road in Talbot County. Mr. Scrimgeour and other property owners in the vicinity oppose the construction. According to the complaint, in late August, Mr. Scrimgeour learned that George Kinney, Talbot County's Planning Officer, had scheduled a closed meeting between the Talbot County Planning Commission and the Talbot County Agricultural Resolution Board to discuss the structure. The meeting was to occur during the Planning Commission's regular monthly meeting scheduled for September 6, 2006. Shortly before the September 6 session, Mr. Scrimgeour asked to participate in the session, but allegedly he was told by Martin Sokolich, an employee in the Office of Planning and Zoning, that the session was closed to the public. On September 5, Mr. Scrimgeour e-mailed Mr. Kinney to express his concerns about the Agricultural Resolution Board's role and to ask that "all deliberations concerning this important issue be open to the public," but he received no response.

The complaint went on to explain that Mr. Scrimgeour recently learned that the Planning Commission did consider the equestrian structure on September 6, but the Agricultural Resolution Board did not attend. The Planning Commission also addressed the structure at a subsequent session on November 1, 2006, which Mr. Scrimgeour attended. The Office of Planning and Zoning approved a building permit on November 17. According to the complaint, however, until recently Mr. Scrimgeour "was without knowledge that the Planning Commission had made its

determination, for all intents and purposes, months earlier at a meeting he was expressly told he could not attend.”¹ The complaint alleged that the Planning Commission violated §10-506, requiring a public body to give reasonable notice in advance of a meeting, and §10-507, granting the public the right to attend open sessions, in connection with the September 6 meeting.²

Michael Pullen, County Attorney for Talbot County, submitted a timely response on behalf of the Planning Commission. According to the response, the September 6 meeting was an open session, and members of the public were present. As to the conversation between Mr. Scrimgeour and Mr. Sokolich, the response noted a discrepancy between the parties’ recollection. According to Mr. Sokolich, when Mr. Scrimgeour visited the Planning Office in August, he learned that Mr. Kinney had scheduled a work session with the Planning Commission following the Planning Commission’s September 6 meeting. Mr. Sokolich recalled describing the purpose of the work session as “administrative in nature,” and no discussion on the merits or impact of the equestrian structure was to occur. “Rather, Mr. Kinney was to seek the Commission’s recommendation on what input could be considered ... and their assent that approval or denial remained the sole responsibility of the Planning Officer. As such, no [public] testimony ... would be at that time but would be welcome at a hearing scheduled for that purpose.” While the Agricultural Resolution Board was mentioned, it was simply a suggestion and never carried out. In other words, Mr. Sokolich recalled telling Mr. Scrimgeour that he could not participate in the Planning Commission’s meeting, *not* that he could not attend.³ According to the response, Mr. Sokolich had no reason to know of Mr. Scrimgeour’s misunderstanding that he would not be able to attend. Nor did Mr. Scrimgeour’s e-

¹ Although we shall in no way comment on the underlying land use dispute, we note that the Planning Commission’s role was not as decision maker about the construction of the structure but rather as advisor to the Planning Officer, who made the ultimate decision to issue the permit. Among documents enclosed with the complaint were copies a notice and agenda issued in connection with the Planning Commission’s September 6 session, a transcript of the relevant portion of the session, and the Planning Commission’s “summary of decisions,” which reflected not a decision as such but evidence of the Planning Commission’s support for construction of the structure.

² All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

³ Mr. Sokolich’s admonition about participation turned out to be incorrect. The Chairman of the Planning Commission invited public comments, so if Mr. Scrimgeour had been there, he would have been able to comment. The Open Meetings Act, however, simply grants a right to the public to attend a meeting, §10-507(a), not a right to participate in it. If there is such a right, it derives from other law. Therefore, any allegation concerning a denial of participation is beyond the jurisdiction of the Compliance Board. 3 *OMCB Opinions* 145, 146 (2001).

mail communication to Mr. Kinney claim that he had been told he could not attend the September 6 meeting.⁴

II

Discussion

Two cornerstones of the Open Meetings Act are a public body's obligation to give notice of meetings and, with some exceptions, to hold open meetings. §§10-505, 506, and 507(a). Notice of the Planning Commission's September 6 meeting was provided us, and the meeting – including the discussion about the equestrian structure – was open to the public. To be sure, the agenda embedded in the notice did not specifically mention the item that Mr. Scrimgeour was interested in, but apparently the omission was due to the fact that the Planning Officer, not the Planning Commission, was the decision maker. In any event, a public body is not required to provide an agenda in advance of a meeting. Therefore, a variation between an agenda made public in advance of a meeting and the actual discussion items is not a violation of the Act. *See, e.g., 4 OMCB Opinions* 168, 172 (2005); *3 OMCB Opinions* 303, 304-305 (2003).

What if, as Mr. Scrimgeour recollects but Mr. Sokolich denies, he had indeed been told that he could not attend the portion of the September 6 meeting at which the equestrian structure issue would be discussed? A staff member's erroneous information does not negate the legal effect of proper notice, but we could imagine particularly egregious circumstances in which misleading information would have the practical effect of denying a member of the public access to an ostensibly open meeting. In different contexts, we have cautioned that a meeting must be open in practice and not only in theory. *See, e.g., 4 OMCB Opinions* 63, 65 (2004).

We do not make such a finding here, however. First, we have the miniature *Rashomon* problem of differing recollections. Second, we have no evidence that Mr. Sokolich, even assuming he did provide incorrect information, was acting on behalf of the Planning Commission – which, after all, carried out its responsibility properly. This is not like a prior case in which a public body was held to have violated the Act because the staff member who was charged with the task failed to post notice at all. *1 OMCB Opinions* 44 (1993). Given proper written notice, we do not attribute a violation to the Planning Commission based on a disputed account of the

⁴ When the County became aware that Mr. Scrimgeour thought he had been excluded from the meeting, the matter was again placed on the Planning Commission's agenda for a November 1 meeting. Mr. Scrimgeour and other interested neighbors were given direct notice and offered the opportunity to participate. A copy of a transcript of the relevant portion of the November 1 meeting was provided with the response.

conversation between Messrs. Scrimgeour and Sokolich. *Cf. 3 OMCB Opinions* 164, 169-70 (2001).

III

Conclusion

The Talbot County Planning Commission did not violate the notice or open meeting provisions of the Open Meetings Act in connection with a meeting held on September 6, 2006.

OPEN MEETINGS COMPLIANCE BOARD

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